Arlington County Bar Association
Trusts & Estates Section

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Insolvent Estates:
Liability of Personal Representatives, Beneficiaries and Revocable Trusts

All references to code sections are to Virginia Code unless stated otherwise.

Relevant Virginia Code Sections:

- §18.2-504: Destroying or concealing wills [is a felony]
- §29.1-733.20. Transfer [of watercraft] by operation of law
- §46.2-634: Transfer of title [of motor vehicles] when no qualification on estate
- §64.2-309: Family allowance
- §64.2-310: Exempt property
- §64.2-311: Homestead allowance
- §64.2-455: Wills to be recorded; recording copies; effect; transfer to The Library of Virginia
- §64.2-528: Order in which debts and demands of decedents to be paid
- §64.2-529: Creditors to be paid in order of their classification; class paid ratably; when representative not liable for paying debt
- §64.2-532: Real estate of decedent as assets for payment of debts
- §64.2-533: Administration of assets for payment of debts
- §64.2-534: Liability of heir or devisee for value of real estate sold and conveyed; validity of premature conveyances
- §64.2-535: When sale and conveyance within one year valid against creditors; proceeds paid to special commissioner; bond to obtain proceeds
- §64.2-536: Liability of heir or devisee; action by personal representative or creditor; recording notice of lis pendens; evidence
- §64.2-545: Transfer of assets to administrator de bonis non; administration of assets
- §64.2-550: Proceedings for receiving proof of debts by commissioners of accounts
- §64.2-551: Account of debts by commissioners of accounts
- §64.2-552: How claims filed before commissioners of accounts; tolling of limitations period
- §64.2-553: When court to order payment of debts

- §64.2-554: When distribution may be required; refunding bond
- §64.2-555: When fiduciaries are protected by refunding bonds
- §64.2-556: Order to creditors to show cause against distribution of estate to legatees or distributees; liability of legatees or distributees to refund
- §64.2-600: Definitions
- §64.2-601: Payment or delivery of small asset by affidavit
- §64.2-602: Payment or delivery of small asset valued at $25,000 or less without affidavit
- §64.2-603: Discharge and release of payor
- §64.2-604: Payment or delivery of small asset; funeral expenses
- §64.2-620: Nonprobate transfers on death
- §64.2-634: Liability for creditor claims and statutory allowances
- §64.2-747: Creditor's claim against settlor
- §64.2-1302: Waiver of inventory and settlement for certain estates

Case Law:

- Lindsay v. Howerton, 12 Va. 9, 1807 Va. LEXIS 57, 2 Hen. 9, M. 9 (Va. Sept. 9, 1807)
- McCormick's Ex'rs v. Wright's Ex'rs, 79 Va. 524, 1884 Va. LEXIS 108 (Va. 1884)
- Deering & Co. v. Kerfoot's Ex'r, 89 Va. 491, 16 S.E. 671, 1892 Va. LEXIS 124 (Va. 1892)
- Dolby v. Dolby, 280 Va. 132, 694 S.E.2d 635, 2010 Va. LEXIS 69 (Va. 2010)

Outline and Discussion Questions:

1. Insolvent Estates in General
    a. §64.2-528 provides the "Order in which debts and demands of decedents to be paid" for all insolvent estates:
        i. Costs and expenses of administration;
            1. "An executor or administrator ought to be credited in his administration account for fees paid to counsel, notwithstanding those fees were more than the law allowed." Lindsay v. Howerton, 12 Va. (2 Hen. & M.) 9 (1807).
        ii. Allowances:
            1. Family allowance, up to $24,000 for surviving spouse and minor children pursuant to §64.2-309
            2. Exempt property, up to $20,000 of "household furniture, automobiles, furnishings, appliances, and personal effects," or other items if the total value of those items is less than $20,000, for the surviving spouse or the minor children pursuant to §64.2-310
            3. Homestead allowance of up to $20,000, for the surviving spouse or minor children, pursuant to §64.2-311
        iii. Funeral expenses not to exceed $4,000

iv. Debts and taxes with preference under federal law;
v. Medical and hospital expenses of the last illness of the decedent, including compensation of persons attending him not to exceed $2,150 for each hospital and nursing home and $425 for each person furnishing services or goods;
vi. Debts and taxes due the Commonwealth;
vii. Debts due as trustee for persons under disabilities; as receiver or commissioner under decree of court of the Commonwealth; as personal representative, guardian, conservator, or committee when the qualification was in the Commonwealth; and for moneys collected by anyone to the credit of another and not paid over, regardless of whether or not a bond has been executed for the faithful performance of the duties of the party so collecting such funds;
viii. Debts and taxes due localities and municipal corporations of the Commonwealth; and
ix. All other claims.

b. §64.2-529 requires that creditors at each order of classification be paid ratably, and that the personal representative is not liable to creditors of a higher classification after payment to a creditor of a lower classification if at least twelve months elapsed since decedent's death and the personal representative did not have notice of the superior claim.
    i. "Wills must conform to this section as to the order in which personalty shall be applied in the payment of a decedent's debts; and it is beyond the power of a testator to affect the legal order of payment by a direction in his will." Deering & Co. v. Kerfoot, 89 Va. 491, 16 S.E. 671 (1892)
    ii. "It is the duty of a personal representative to pay the debts of the decedent in their order of priority as prescribed by law, and if he pays an inferior debt, leaving a debt of a preferred class unpaid, the payment constitutes a devastavit in case of a deficiency of assets." McCormick v. Wright, 79 Va. 524 (1884).
c. "Any person to whom payment or delivery of a small asset has been made is answerable and accountable therefor to any personal representative of the decedent's estate or to any other successor having an equal or superior right." §64.2-603
d. The personal representative can request a hearing for debts and demands under §64.2-550, and can obtain a court order for distribution to creditors under §64.2-553 to protect the personal representative from personal liability to a creditor of the estate.

2. Insolvent small estate under Virginia Small Estate Act (§§64.2-601 – 64.2-604)[1]
    a. Admit the Will to Probate without Qualification
        i. Required to use the Affidavit under §64.2-601
        ii. Avoids any concern that the holder of the Will is intentionally concealing it, which is a felony under §18.2-504.
        iii. Vests title in real estate owned by the decedent §64.2-455.
        iv. The surviving spouse's right to claim the elective share does not expire until six months after the later of: (a) the time of admission of the will to probate; or (b) the qualification of an administrator in an intestate estate.
        v. Evidences ownership of assets later discovered.
    b. What claims should be paid and how?
        i. For estates up to $50,000 in value, the Small Estate Affidavit requires that the affiant swear that they "shall have a fiduciary duty to safeguard and promptly pay or deliver the small asset as required by the laws of the Commonwealth." §64.2-601(A)(8)
        ii. If the asset is valued at less than $25,000[2], no affidavit is required, pursuant to §64.2-602, but the "designated successor shall have a fiduciary duty to safeguard and promptly pay or deliver the small asset as required by the laws of the Commonwealth to the other successors, if any." §64.2-602(B)
        iii. Thus, the designated successor, claiming the decedent's assets under the Virginia Small Estate Act, is subject to the general rules for insolvent estates under §64.2-528 and §64.2-529.
            1. *NB:* For an estate with a surviving spouse and/or minor children, the family, homestead and exempt property allowances should cover the entire small estate.
    c. Is there any way to do a hearing for debts & demands (§64.2-550) and show cause order (§64.2-556) or otherwise discharge liability to creditors before statute of limitations expires?
        i. Only if a personal representative qualifies, which may not be unduly burdensome if the estate is $25,000 or less and heir, beneficiary, or creditor whose claim exceeds the value of the estate seeks qualification, allowing the inventory and accounting to be waived by §64.2-1302.

[1] The author was unable to find any case law that cited the Virginia Small Estate Act.
[2] Limit increased from $15,000 to $25,000 in 2014.

d. **Discussion Question:** Any downside to the successors just taking the assets, knowing that they may be subject to claims of creditors, and waiting for some creditor to surface with a valid claim?

3. Insolvent estate with Pour-Over Will that pays to Revocable Trust. Revocable Trust funded by life insurance, retirement accounts, or other transfer-on-death assets.
    a. Admit the Will to Probate Without Qualification (see 2(a), above)
    b. What liability does the Trust have to the creditors of the estate?
        i. "No proceeding to subject a trustee, trust assets, or distributees of such assets to such claims, costs, and expenses shall be commenced unless the personal representative of the settlor has received a written demand by a surviving spouse, a creditor, or one acting for a minor or dependent child of the settlor, and no proceeding shall be commenced later than two years following the death of the settlor. This section shall not affect the right of a trustee to make distributions required or permitted by the terms of the trust prior to being served with process in a proceeding brought by the personal representative." §64.2-747
        ii. **Discussion Question:** Any special liability for Federal / Virginia taxes?
    c. **Discussion Question:** If the estate qualifies as an insolvent small estate, should the Trustee of the Trust use a Small Estate Affidavit to take any of the Estate's assets?
        i. For funeral expenses and other priority categories?
        ii. Or all assets, but then open up the Trust to further liability to refund the estate?

4. To what extent may creditors pursue non-probate transfer on death assets?
    a. Nonprobate transfers on death: §64.2-620(B) "This section does not limit rights of creditors under other laws of the Commonwealth."
    b. Uniform Real Property Transfer on Death Act / Liability for creditor claims and statutory allowances: §64.2-634
        i. "[P]roperty transferred at the transferor's death by a transfer on death deed is subject to claims of the transferor's creditors, costs of administration of the transferor's estate, the expenses of the transferor's funeral and disposal of remains, and statutory allowances to a surviving spouse and children of the transferor including the family allowance, the right to exempt property, and the homestead allowance to the extent the transferor's probate estate is inadequate to satisfy those claims, costs, expenses, and allowances."

ii. “A proceeding to enforce the liability under this section shall be commenced not later than one year after the transferor's death.”

c. But, not tenancy by the entireties property when one spouse survives:
“The estate was liable to pay the mortgage debt based on two questions: (1) whether the decedent had a personal obligation to pay the debt; and (2) whether the mortgage debt was secured by real property owned by the decedent upon his death. The answer to the first question was that the decedent was personally and solely liable for the note that he signed, and therefore, the mortgage debt was a debt of his estate. In answer to the second question, the mortgage debt was not secured by real property owned by the decedent upon his death. The decedent's ownership interest did not survive his death. The spouses owned the property as tenants by the entirety with the right of survivorship. Therefore, the property passed to the surviving spouse by operation of law and was not part of the estate.” Dolby v. Dolby, 280 Va. 132, 694 S.E.2d 635 (2010).

§ 18.2-504. Destroying or concealing wills

If any person fraudulently destroy or conceal any will or codicil, with intent to prevent the probate thereof, he shall be guilty of a Class 6 felony.

Code 1950, § 18.1-309; 1960, c. 358; 1975, cc. 14, 15.

The chapters of the acts of assembly referenced in the historical citation at the end of this section may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

Code of Virginia
Title 29.1. Game, Inland Fisheries and Boating
Chapter 7. Boating Laws

§ 29.1-733.20. Transfer by operation of law

A. As used in this section, unless the context requires a different meaning:

"By operation of law" means pursuant to a law or judicial order affecting ownership of a watercraft:

1. Because of death, such as in the case of a legatee, distributee, or surviving joint owner;

2. Because of divorce or other family law proceeding;

3. Because of any written agreement ratified or incorporated in a decree or order of a court of record;

4. Because of merger, consolidation, dissolution, insolvency, or bankruptcy;

5. Because of an execution sale;

6. Through the exercise of the rights of a lien creditor or a person having a lien created by statute or rule of law, including a lien provided for in § 43-34;or

7. Through other legal process.

"Transfer-by-law statement" means a record signed by a transferee stating that by operation of law the transferee has acquired or has the right to acquire an ownership interest in a watercraft.

B. A transfer-by-law statement shall contain:

1. The name and last-known mailing address of the owner of record and the transferee and the other information required by subsection B of § 29.1-733.7;

2. Documentation sufficient to establish the transferee's ownership interest or right to acquire the ownership interest;

3. A statement that:

a. The certificate of title is an electronic certificate of title;

b. The transferee does not have possession of the written certificate of title created in the name of the owner of record; or

c. The transferee is delivering the written certificate to the Department with the transfer-by-law statement;

4. Except for a transfer described in subdivision 1 of the definition of "by operation of law," evidence that notification of the transfer and the intent to file the transfer-by-law statement has been sent to all persons indicated in the files of the Department as having an interest, including a security interest, in the watercraft; and

5. If the owner is dead and no fiduciary has qualified for his estate, an estate statement to the effect that no qualification for the estate has been made, that no qualification is expected, and

that the decedent's debts have been paid or that the proceeds from the sale of the watercraft will be applied against his debts. The estate statement shall contain the name, residence at the time of death, and date of death of the decedent and the names of any other persons having an interest in the watercraft for which the transfer of title is sought. If these persons are of legal age, they shall signify in writing their consent to the transfer.

C. Unless the Department rejects a transfer-by-law statement for a reason stated in subsection C of § 29.1-733.8 or because the statement does not include documentation or an estate statement satisfactory to the Department as to the transferee's ownership interest or right to acquire the ownership interest, not later than 20 days after delivery to the Department of the transfer-by-law statement and payment of fees and taxes payable under the law of the Commonwealth other than this article in connection with the statement or with the acquisition or use of the watercraft, the Department shall:

1. Accept the statement;

2. Amend the files of the Department to reflect the transfer; and

3. If the name of the owner whose ownership interest is being transferred is indicated on the certificate of title:

a. Cancel the certificate even if the certificate has not been delivered to the Department;

b. Create a new certificate indicating the transferee as owner;

c. Indicate on the new certificate any security interest indicated on the canceled certificate, unless a court order provides otherwise; and

d. Deliver the new certificate or a record evidencing an electronic certificate.

D. This section does not apply to a transfer of an interest in a watercraft by a secured party under Part 6 (§ 8.9A-601 et seq.) of Title 8.9A.

2013, c. 787.

The chapters of the acts of assembly referenced in the historical citation at the end of this section may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

§ 46.2-634. Transfer of title when no qualification on estate

If the holder of a certificate of title is dead and there has been no qualification on his estate, a transfer may be made by a legatee or distributee if there is presented to the Department a statement made by a legatee or distributee to the effect that there has not been and there is not expected to be a qualification on the estate and that the decedent's debts have been paid or that the proceeds from the sale of the motor vehicle will be applied against his debts. The statement shall contain the name, residence at the time of death, date of death, and the names of any other persons having an interest in the motor vehicle which is sought to be transferred and, if these persons are of legal age, they shall signify in writing their consent to the transfer of the title.

Code 1950, § 46-90; 1958, c. 541, § 46.1-94; 1964, c. 574; 1972, c. 211; 1989, c. 727 .

Code of Virginia
Title 64.2. Wills, Trusts, and Fiduciaries
Chapter 3. Rights of Married Persons

§ 64.2-309. Family allowance

A. In addition to any other right or allowance under this article, upon the death of a decedent who was domiciled in the Commonwealth, the surviving spouse and minor children whom the decedent was obligated to support are entitled to a reasonable allowance in money out of the estate for their maintenance during the period of administration, which allowance shall not continue for longer than one year if the estate is inadequate to discharge all allowed claims. The family allowance may be paid as a lump sum not to exceed $24,000, or in periodic installments not to exceed $2,000 per month for one year. It is payable to the surviving spouse for the use of the surviving spouse and minor children or, if there is no surviving spouse, to the person having the care and custody of the minor children. If any minor child is not living with the surviving spouse, the family allowance may be made partially to the spouse and partially to the person having the care and custody of the child, as their needs may appear. If there are no minor children, the allowance is payable to the surviving spouse.

B. The family allowance has priority over all claims against the estate.

C. The family allowance is in addition to any benefit or share passing to the surviving spouse or minor children by the will of the decedent, by intestate succession, or by way of elective share.

D. The death of any person entitled to a family allowance terminates the person's right to any allowance not yet paid.

1981, c. 580, §§ 64.1-151.1, 64.1-151.4; 1987, c. 222; 1990, c. 831; 1996, c. 549;2001, c. 368;2012, c. 614;2014, c. 532.

The chapters of the acts of assembly referenced in the historical citation at the end of this section may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

Code of Virginia
Title 64.2. Wills, Trusts, and Fiduciaries
Chapter 3. Rights of Married Persons

§ 64.2-310. Exempt property

A. In addition to any other right or allowance under this article, the surviving spouse of a decedent who was domiciled in the Commonwealth is entitled from the estate to value not exceeding $20,000 in excess of any security interests therein in household furniture, automobiles, furnishings, appliances, and personal effects. If there is no surviving spouse, the minor children of the decedent are entitled in equal shares to such property of the same value. If the value of the exempt property selected in excess of any security interests therein is less than $20,000, or if there is not $20,000 worth of exempt property in the estate, the spouse or minor children are entitled to other assets of the estate, if any, to the extent necessary to make up the $20,000 value.

B. The right to exempt property and other assets of the estate needed to make up a deficiency of exempt property has priority over all claims against the estate, except the family allowance.

C. The right to exempt property is in addition to any benefit or share passing to the surviving spouse or minor children by the will of the decedent, by intestate succession, or by way of elective share.

1981, c. 580, § 64.1-151.2; 1990, c. 831; 1996, c. 549;2001, c. 368;2012, c. 614;2014, c. 532.

The chapters of the acts of assembly referenced in the historical citation at the end of this section may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

Code of Virginia
Title 64.2. Wills, Trusts, and Fiduciaries
Chapter 3. Rights of Married Persons

§ 64.2-311. Homestead allowance

A. In addition to any other right or allowance under this article, a surviving spouse of a decedent who was domiciled in the Commonwealth is entitled to a homestead allowance of $20,000. If there is no surviving spouse, each minor child of the decedent is entitled to a homestead allowance amounting to $20,000, divided by the number of minor children.

B. The homestead allowance has priority over all claims against the estate, except the family allowance and the right to exempt property.

C. The homestead allowance is in lieu of any share passing to the surviving spouse or minor children by the decedent's will or by intestate succession; provided, however, if the amount passing to the surviving spouse and minor children by the decedent's will or by intestate succession is less than $20,000, then the surviving spouse or minor children are entitled to a homestead allowance in an amount that when added to the property passing to the surviving spouse and minor children by the decedent's will or by intestate succession, equals the sum of $20,000.

D. If the surviving spouse claims and receives an elective share of the decedent's estate under §§ 64.2-302 through 64.2-307 or Article 1.1 (§ 64.2-308.1 et seq.), as applicable, the surviving spouse shall not have the benefit of any homestead allowance.

1981, c. 580, § 64.1-151.3; 1990, c. 831; 2001, c. 368;2012, c. 614;2014, c. 532;2016, cc. 187, 269.

The chapters of the acts of assembly referenced in the historical citation at the end of this section may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

Code of Virginia
Title 64.2. Wills, Trusts, and Fiduciaries
Chapter 4. Wills

§ 64.2-455. Wills to be recorded; recording copies; effect; transfer to The Library of Virginia

A. Every will or authenticated copy admitted to probate by any circuit court or clerk of any circuit court shall be recorded by the clerk and remain in the clerk's office, except during such time as the same may be carried to another court under a subpoena duces tecum or as otherwise provided in § 17.1-213. A certified copy of such will or of any authenticated copy may be recorded in any county or city wherein there is any estate, real or personal, devised or bequeathed by such will.

B. The personal representative of the testator shall cause a certified copy of any will or of any authenticated copy so admitted to record to be recorded in any county or city wherein there is any real estate of which the testator possessed at the time of his death or that is devised by his will.

C. Every will or certified copy when recorded shall have the effect of notice to all persons of any devise or disposal by the will of real estate situated in a county or city in which such will or copy is so recorded.

D. With the approval of the judges of a circuit court of any county or city, the clerk of such court may transfer such original wills from his office to the Archives Division of The Library of Virginia. A copy of any will that has been microfilmed or stored in an electronic medium, prepared from such microfilmed or electronic record and certified as authentic by the clerk or his designee, shall constitute a certified copy of the will for any purpose arising under this title for which a certified copy of the will is required.

Code 1950, § 64-90; 1964, c. 169; 1966, c. 254; 1968, c. 656, § 64.1-94; 1978, c. 366; 1994, c. 64; 2001, c. 836;2002, c. 832;2012, c. 614.

The chapters of the acts of assembly referenced in the historical citation at the end of this section may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

§ 64.2-528. Order in which debts and demands of decedents to be paid

When the assets of the decedent in his personal representative's possession are not sufficient to satisfy all debts and demands against him, they shall be applied to the payment of such debts and demands in the following order:

1. Costs and expenses of administration;

2. The allowances provided in Article 2 (§ 64.2-309 et seq.) of Chapter 3;

3. Funeral expenses not to exceed $4,000;

4. Debts and taxes with preference under federal law;

5. Medical and hospital expenses of the last illness of the decedent, including compensation of persons attending him not to exceed $2,150 for each hospital and nursing home and $425 for each person furnishing services or goods;

6. Debts and taxes due the Commonwealth;

7. Debts due as trustee for persons under disabilities; as receiver or commissioner under decree of court of the Commonwealth; as personal representative, guardian, conservator, or committee when the qualification was in the Commonwealth; and for moneys collected by anyone to the credit of another and not paid over, regardless of whether or not a bond has been executed for the faithful performance of the duties of the party so collecting such funds;

8. Debts and taxes due localities and municipal corporations of the Commonwealth; and

9. All other claims.

No preference shall be given in the payment of any claim over any other claim of the same class, and a claim due and payable shall not be entitled to a preference over a claim not due.

Code 1950, § 64-147; 1956, c. 231; 1966, c. 274; 1968, c. 656, § 64.1-157; 1972, c. 96; 1981, c. 580; 1986, c. 109; 1993, c. 259; 1996, c. 84;1997, c. 801;2007, c. 735;2008, cc. 666, 817;2012, c. 614; 2014, c. 532.

§ 64.2-529. Creditors to be paid in order of their classification; class paid ratably; when representative not liable for paying debt

No payment shall be made to creditors of any one class until all those of the preceding class have been fully paid, and if the assets are not sufficient to pay all the creditors of any one class, the creditors of such class shall be paid ratably; but a personal representative who, after 12 months from his qualification, pays a debt or demand of his decedent is not personally liable for any debt or demand against the decedent of an equal or superior class, whether it is of record or not, unless he had notice of such debt or demand before making such payment.

Code 1950, § 64-148; 1968, c. 656, § 64.1-158; 2012, c. 614.

§ 64.2-532. Real estate of decedent as assets for payment of debts

If a decedent's personal estate is insufficient to satisfy the decedent's debts and lawful demands against his estate, all real estate of the decedent, including such real estate that remains after satisfying the debts with which the real estate was charged or was subject to under the decedent's will, are assets for the payment of the decedent's debts and all lawful demands against his estate. A decedent's real estate shall be applied to his debts and lawful demands against his estate in the same order that the personal estate of a decedent is applied pursuant to § 64.2-528.

Code 1950, § 64-171; 1968, c. 656, § 64.1-181; 2012, c. 614.

§ 64.2-533. Administration of assets for payment of debts

The circuit court in which a report of the accounts of a decedent's personal representative and of the debts and demands against the decedent's estate is or may be filed may administer the real estate of the decedent in the possession of the decedent's personal representative that is an asset for the payment of the decedent's debts and demands against the decedent's estate, or any circuit court may administer such real estate.

Code 1950, § 64-172; 1968, c. 656, § 64.1-182; 2012, c. 614.

§ 64.2-534. Liability of heir or devisee for value of real estate sold and conveyed; validity of premature conveyances

A. Any heir or devisee who sells and conveys any real estate that is an asset for the payment of a decedent's debts or lawful demands against his estate pursuant to § 64.2-532 is liable for the value of such real estate, with interest, to those persons entitled to be paid out of the real estate.

B. Notwithstanding the provisions of subsection A, the real estate sold or conveyed is not liable to those persons entitled to be paid out of the real estate provided that (i) the sale was made more than one year after the death of the decedent, (ii) the conveyance was bona fide, and (iii) at the time of such conveyance, no action has been commenced for the administration of the real estate and no reports have been filed of the debts and demands of such creditors.

C. No sale and conveyance of such real estate made by an heir or devisee within one year after the death of the decedent is valid against creditors of such decedent, except as otherwise provided in § 64.2-535, provided that any sale and conveyance made within one year after the death of a decedent is valid against creditors as if it were made more than one year after the death of the decedent if no action has been commenced for the administration of the real estate and no report of the debts and demands has been filed within one year after the death of the decedent.

Code 1950, § 64-173; 1950, p. 606; 1968, c. 656, § 64.1-183; 2012, c. 614;2015, c. 332.

§ 64.2-535. When sale and conveyance within one year valid against creditors; proceeds paid to special commissioner; bond to obtain proceeds

A. For purposes of this section:

"Net proceeds" means the purchase price for the real estate, including money, deferred purchase money obligations, and other securities, remaining after the payment of the expenses of sale ordinarily paid by the seller in sales of such real estate and the discharge of indebtedness and encumbrances that the real estate is primarily liable for by law.

B. Any sale and conveyance of real estate that is an asset for the payment of a decedent's debts or lawful demands against his estate pursuant to § 64.2-532 made within one year after the death of the decedent is valid against creditors of such decedent, if such real estate is sold and conveyed pursuant to a decree of a court of competent jurisdiction in an action for partition, sale of lands of persons under a disability, or other judicial sale, and the net proceeds of sale are paid to a special commissioner appointed by the court.

C. The special commissioner shall hold the net proceeds paid to him in lieu of the real estate subject to the claims of the decedent's creditors in the same manner and to the same extent as such real estate would have been if not sold until at least one year after the death of the decedent. If no claim has been asserted against the net proceeds, the special commissioner shall distribute the net proceeds to those creditors entitled thereto in proportion to their interest in the real estate upon (i) the expiration of the one-year period or (ii) at any time within the one-year period upon posting bond with such surety as may be prescribed by the court to secure any claims against the real estate or net proceeds.

D. A purchaser of any real estate sold and conveyed in accordance with this section is not required to see to the application of the purchase money.

E. The special commissioner who receives and holds such net proceeds or refunding bond shall give such bond as required by the court appointing him.

Code 1950, § 64-173.1; 1968, c. 656, § 64.1-184; 1996, c. 65;2012, c. 614.

§ 64.2-536. Liability of heir or devisee; action by personal representative or creditor; recording notice of lis pendens; evidence

An heir or devisee may be sued by the personal representative or any creditor to whom a claim is due for which the estate descended or devised is liable, or for which the heir or devisee is liable with regard to such estate. Any judgment for such a claim entered against the personal representative of the decedent is prima facie evidence of the claim against the heir or devisee in a suit against the heir or devisee by the personal representative or any creditor. In any suit by the personal representative or any creditor pursuant to this article, he shall record a notice of lis pendens as required by § 8.01-268 at the time of filing such suit. The personal representative or creditor has the burden to show to the satisfaction of the court that there are not sufficient personal assets in the estate to satisfy all claims against the estate.

Code 1950, § 64-174; 1968, cc. 515, 656, § 64.1-185; 2012, c. 614.

§ 64.2-545. Transfer of assets to administrator de bonis non; administration of assets

A. If the powers of a personal representative have ceased and there is an administrator de bonis non of the decedent's estate, the personal representative may pay and deliver to such administrator de bonis non, with the consent of the court or clerk before which the administrator de bonis non qualified, the assets of the decedent, whether converted or not, for which such former personal representative is responsible. The court or clerk shall not consent to the payment and delivery of such assets to the administrator de bonis non unless the administrator de bonis non gives a bond sufficient to cover the additional assets to be paid or delivered to him. The administrator de bonis non shall administer such assets paid or delivered to him as assets received in due course of administration. The administrator de bonis non shall provide a receipt for such assets in the form of a voucher in the settlement of the accounts of the former personal representative. The former personal representative shall not be liable for the assets lawfully paid or delivered to the administrator de bonis non.

B. The administrator de bonis non may bring an action against the former personal representative or his estate for mismanagement or to compel the payment and delivery to the administrator de bonis non of the assets of the decedent that were wrongfully converted by the former personal representative.

C. Nothing contained in this section shall (i) limit the liability of the former personal representative and his sureties for any breach of duty committed by him with respect to the assets of the decedent's estate before they were paid over and delivered to the administrator de bonis non by him or (ii) bar the beneficiaries, creditors, or any other parties in interest from bringing any action against the former personal representative for his acts or omissions while serving as the personal representative.

Code 1950, § 64-156; 1968, c. 656, § 64.1-166; 1991, c. 58; 2012, c. 614.

§ 64.2-550. Proceedings for receiving proof of debts by commissioners of accounts

A. A commissioner of accounts who has for settlement the accounts of a personal representative of a decedent shall, when requested to so do by a personal representative or any creditor, legatee, or distributee of a decedent, or may at any other time determined by the commissioner of accounts, even though no accounting is pending, conduct a hearing for receiving proof of debts and demands against the decedent or the decedent's estate. The commissioner of accounts shall publish notice of the hearing at least 10 days before the date set for the hearing in a newspaper published or having general circulation in the jurisdiction where the personal representative qualified. and shall also post a notice of the time and place of the hearing at the front door of the courthouse of the court of the jurisdiction where the personal representative qualified. The commissioner of accounts may adjourn the hearing from time to time as necessary.

B. The personal representative shall give written notice by personal service or by regular, certified, or registered mail at least 10 days before the date set for the hearing to any claimant of a disputed claim that is known to the personal representative at the last address of the claimant known to the personal representative. The notice shall inform the claimant of his right to attend the hearing and present his case, his right to obtain another hearing date if the commissioner of accounts finds the initial date inappropriate, and the fact that the claimant will be bound by any adverse ruling. The personal representative shall also inform the claimant of his right to file exceptions with the circuit court in the event of an adverse ruling. The personal representative shall file proof of any mailing or service of notice with the commissioner of accounts.

C. The commissioner of accounts may direct the personal representative, the claimant, or both of them to institute a proceeding in the circuit court to establish the validity or invalidity of any claim or demand that the commissioner of accounts deems not otherwise sufficiently proved.

Code 1950, §§ 64-161, 64-162; 1966, c. 335; 1968, cc. 385, 656, §§ 64.1-171, 64.1-172; 1981, c. 484; 1989, c. 492; 2012, c. 614.

§ 64.2-551. Account of debts by commissioners of accounts

The commissioner of accounts, within 60 days from the date of the hearing for receiving proof of debts and demands against the decedent or the decedent's estate or the date of the last adjournment of any such hearing, shall make out an account of all such debts or demands as have been sufficiently proved, stating separately the debts and demands of each class.

Code 1950, § 64-162; 1966, c. 335; 1968, c. 656, § 64.1-172; 2012, c. 614.

§ 64.2-552. How claims filed before commissioners of accounts; tolling of limitations period

A. Any person who seeks to prove that he has a debt or demand against the decedent or the decedent's estate shall file his claim in writing with the commissioner of accounts, who shall endorse upon it the date of the filing and sign the endorsement in his official character.

B. If the commissioner of accounts recommends in writing the recovery or enforcement of a claim for a debt or demand against the decedent or the decedent's estate, the filing of such claim with the commissioner of accounts pursuant to subsection A shall toll any limitations period that would otherwise bar an action for the recovery or enforcement of the claim or bar the filing of such claim until the termination of the proceedings commenced under § 64.2-550.

Code 1950, § 64-163; 1968, c. 656, § 64.1-173; 1989, c. 492; 2012, c. 614.

§ 64.2-553. When court to order payment of debts

A. Upon confirmation of a report of the accounts of any personal representative and of the debts and demands against the decedent's estate pursuant to Chapter 12 (§ 64.2-1200 et seq.), the court shall order that so much of the estate in the possession of the personal representative as is proper be applied to the payment of such debts and demands. The court, in its discretion, may order that a portion of the estate be reserved to pay all or a proportion of a claim of a surety for the decedent or any other contingent claim against the estate, or to pay all or a proportion of any other claim not finally passed upon, provided that creditors of the same class shall be paid in the same proportion.

B. For any claim allowed subsequent to any dividend where the court ordered that a portion of the estate be reserved to pay such a claim, the court shall order that the claim be paid from the estate in the possession of the personal representative, regardless of the existence of any debt or demand of superior dignity for which no reservation has been ordered. The claim shall be paid in the same proportion as creditors of the same class, provided, however, that whether there be enough reserved to pay the claim pursuant to this subsection shall not affect any dividend already paid.

C. If there are assets remaining in the possession of the personal representative after claims are paid pursuant to subsections A and B, or if further assets come into the possession of the personal representative, such surplus shall be divided among all the decedent's creditors who have proved debts and demands against the decedent's estate in the order and proportion in which they may be entitled.

Code 1950, §§ 64-164, 64-165, 64-166; 1968, c. 656, §§ 64.1-174, 64.1-175, 64.1-176; 2012, c. 614.

The chapters of the acts of assembly referenced in the historical citation at the end of this section may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

§ 64.2-554. When distribution may be required; refunding bond

A personal representative shall not be compelled to pay any legacy made in the will or to distribute the estate of the decedent for six months from the date of the order conferring authority on the first executor or administrator of such decedent and, except when it is otherwise specifically provided for in the will, the personal representative shall not be compelled to make such payment or distribution until the legatee or distributee gives a bond, executed by himself or some other person, with sufficient surety, to refund a due proportion of any debts or demands subsequently proved against the decedent or the decedent's estate and of the costs of the recovery of such debts or demands. Such bond shall be filed and recorded in the clerk's office of the court that may have decreed such payment or distribution or in which the accounts of such representative may be recorded.

Code 1950, § 64-167; 1968, c. 656, § 64.1-177; 2012, c. 614.

§ 64.2-555. When fiduciaries are protected by refunding bonds

If any personal representative pays any legacy made in the will or distributes any of the estate of the decedent and a proper refunding bond for what is so paid or distributed, with sufficient surety at the time it was made, is filed and recorded pursuant to § 64.2-554, such personal representative shall not be personally liable for any debt or demand against the decedent, whether it be of record or not, unless, within six months from his qualification or before such payment or distribution, he had notice of such debt or demand. However, if any creditor of the decedent establishes a debt or demand against the decedent's estate by judgment therefor or by confirmation of a report of the commissioner of accounts that allows the debt or demand, a suit may be maintained on such refunding bond, in the name of the obligee or his personal representative, for the benefit of such creditor, and a recovery shall be had thereon to the same extent that would have been had if such obligee or his personal representative had satisfied such debt or demand.

Code 1950, § 64-168; 1968, c. 656, § 64.1-178; 2012, c. 614.

§ 64.2-556. Order to creditors to show cause against distribution of estate to legatees or distributees; liability of legatees or distributees to refund

A. When a report of the accounts of any personal representative and of the debts and demands against the decedent's estate has been filed in the office of a clerk of a court, whether under §§ 64.2-550 and 64.2-551 or in a civil action, the court, after six months from the qualification of the personal representative, may, on motion of the personal representative, or a successor or substitute personal representative, or on motion of a legatee or distributee of the decedent, enter an order for the creditors and all other persons interested in the estate of the decedent to show cause on the day named in the order against the payment and delivery of the estate of the decedent to his legatees or distributees. A copy of the order shall be published once a week for two successive weeks, in one or more newspapers, as the court directs; the costs of such publication shall be paid by the petitioner or applicant. On or after the day named in the order, the court may order the payment and delivery to the legatees or distributees of the whole or a part of the money and other estate not before distributed, with or without a refunding bond, as it prescribes. However, every legatee or distributee to whom any such payment or delivery is made, and his representatives, may, in a suit brought against him within five years after such payment or delivery is made, be adjudged to refund a due proportion of any claims enforceable against the decedent or his estate that have been finally allowed by the commissioner of accounts or the court, or that were not presented to the commissioner of accounts, and the costs of the recovery of such claim. In the event any claim becomes known to the fiduciary after the notice for debts and demands but prior to the entry of an order of distribution, the claimant, if the claim is disputed, shall be given notice in the form provided in § 64.2-550 and the order of distribution shall not be entered until after expiration of 10 days from the giving of such notice. If the claimant, within such 10-day period, indicates his desire to pursue the claim, the commissioner of accounts shall schedule a date for hearing the claim and for reporting thereon if action thereon is contemplated under § 64.2-550.

B. Any personal representative who has in good faith complied with the provisions of this section and has, in compliance with or, as subsequently approved by, the order of the court, paid and delivered the money or other estate in his possession to any party that the court has adjudged entitled thereto shall not be liable for any demands of creditors and all other persons.

C. Any personal representative who has in good faith complied with the provisions of this section and has, in compliance with, or as subsequently approved by, the order of the court, paid and delivered the money or other estate in his possession to any party that the court has adjudged entitled thereto, even if such distribution shall be prior to the expiration of the period of one year provided in § 64.2-302, Article 1.1 (§ 64.2-308.1 et seq.) of Chapter 3, or § 64.2-313, 64.2-448, or 64.2-457, shall not be liable for any demands of spouses, persons seeking to impeach the will or establish another will, or purchasers of real estate from the personal representative, provided that the personal representative has contacted any surviving spouse known to it having rights of renunciation and ascertained that the surviving spouse had no plan to renounce the will, such intent to be stated in writing in the case of renunciation under § 64.2-302 or Article 1.1 (§ 64.2-

308.1 et seq.) of Chapter 3, as applicable, and that the personal representative has not been notified in writing of any person's intent to impeach the will or establish a later will in the case of persons claiming under § 64.2-448 or 64.2-457 or under a later will.

D. In the case of such distribution prior to the expiration of such one-year period, the personal representative shall take refunding bonds, without surety, to the next of kin or legatees to whom distribution is made, to protect against the contingencies specified in this section.

Code 1950, § 64-169; 1966, c. 335; 1968, c. 656, § 64.1-179; 1980, c. 439; 1982, c. 588; 1989, c. 492; 1991, c. 527; 1996, c. 352;2005, c. 681;2012, c. 614;2016, cc. 187, 269.

Code of Virginia
Title 64.2. Wills, Trusts, and Fiduciaries
Chapter 6. Transfers without Qualification

§ 64.2-600. Definitions

For the purposes of this article, the following definitions apply:

"Designated successor" means one or more successors who are designated pursuant to subdivision A 7 of § 64.2-601.

"Person" means any individual, corporation, business trust, fiduciary, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency, or instrumentality, public corporation, or any other legal or commercial entity.

"Small asset" means any indebtedness owed to or any asset belonging or presently distributable to the decedent, other than real property, having a value, on the date of the decedent's death, of no more than $50,000. A small asset includes any bank account, savings institution account, credit union account, brokerage account, security, deposit, tax refund, overpayment, item of tangible personal property, or an instrument evidencing a debt, obligation, stock, or chose in action.

"Successor" means any person, other than a creditor, who is entitled under the decedent's will or the laws of intestacy to part or all of a small asset.

1981, c. 281, § 64.1-132.1; 2010, c. 269;2012, c. 614.

Code of Virginia
Title 64.2. Wills, Trusts, and Fiduciaries
Chapter 6. Transfers without Qualification

§ 64.2-601. Payment or delivery of small asset by affidavit

A. Any person having possession of a small asset shall pay or deliver the small asset to the designated successor of the decedent upon being presented an affidavit made by all of the known successors stating:

1. That the value of the decedent's entire personal probate estate as of the date of the decedent's death, wherever located, does not exceed $50,000;

2. That at least 60 days have elapsed since the decedent's death;

3. That no application for the appointment of a personal representative is pending or has been granted in any jurisdiction;

4. That the decedent's will, if any, was duly probated;

5. That the claiming successor is entitled to payment or delivery of the small asset, and the basis upon which such entitlement is claimed;

6. The names and addresses of all successors, to the extent known;

7. The name of each successor designated to receive payment or delivery of the small asset on behalf of all successors; and

8. That the designated successor shall have a fiduciary duty to safeguard and promptly pay or deliver the small asset as required by the laws of the Commonwealth.

B. The designated successor may discharge his fiduciary duty to promptly pay or deliver the small asset to a successor who is, or is reasonably believed to be, incapacitated or under a legal disability, by paying or delivering the asset directly to the incapacitated or disabled successor or applying it for such successor's benefit, or by:

1. Paying it to such successor's conservator or, if no conservator exists, guardian;

2. Paying it to such successor's custodian under the Virginia Uniform Transfers to Minors Act (§ 64.2-1900 et seq.) or custodial trustee under the Uniform Custodial Trust Act (§ 64.2-900 et seq.), and, for that purpose, creating a custodianship or custodial trust;

3. If the designated successor does not know of a conservator, guardian, custodian, or custodial trustee, paying it to an adult relative or other person having legal or physical care or custody of such successor to be expended on such successor's behalf; or

4. Managing it as a separate fund on such successor's behalf, subject to such successor's continuing right to withdraw the asset.

C. Any successor may be represented and bound under virtual representation provisions of §§ 64.2-714, 64.2-716, and 64.2-717 with respect to affidavits required and designations of persons to receive payment or delivery of a small asset under this article.

D. A transfer agent of any security, upon the surrender of the certificates, if any, evidencing the

security, shall change the registered ownership on the books of a corporation from the decedent to the designated successor upon the presentation of an affidavit as provided in subsection A.

E. Upon the presentation of an affidavit as provided in subsection A, the designated successor may endorse or negotiate any small asset that is a check, draft, or other negotiable instrument that is payable to the decedent or the decedent's estate.

1981, c. 281, § 64.1-132.2; 1996, c. 549;2001, c. 368;2006, c. 280, 2010, c. 269;2012, c. 614;2013, c. 68;2015, c. 617.

Code of Virginia
Title 64.2. Wills, Trusts, and Fiduciaries
Chapter 6. Transfers without Qualification

§ 64.2-602. Payment or delivery of small asset valued at $25,000 or less without affidavit

A. Notwithstanding the provisions of § 64.2-601, any person having possession of a small asset valued at $25,000 or less may pay or deliver the small asset to any successor provided that:

1. At least 60 days have elapsed since the decedent's death; and

2. No application for the appointment of a personal representative is pending or has been granted in any jurisdiction.

B. The designated successor shall have a fiduciary duty to safeguard and promptly pay or deliver the small asset as required by the laws of the Commonwealth to the other successors, if any.

1981, c. 281, § 64.1-132.3; 2010, c. 269;2012, c. 614;2014, c. 532.

§ 64.2-603. Discharge and release of payor

Any person paying or delivering a small asset pursuant to § 64.2-601 or 64.2-602 is discharged and released to the same extent as if that person dealt with the personal representative of the decedent. Such person is not required to see the application of the small asset or to inquire into the truth of any statement in any affidavit presented pursuant to subsection A of § 64.2-601. If any person to whom such an affidavit is presented refuses to pay or deliver any small asset, it may be recovered, or its payment or delivery compelled, and damages may be recovered, on proof of rightful claim in a proceeding brought for that purpose by or on behalf of the person entitled thereto. Any person to whom payment or delivery of a small asset has been made is answerable and accountable therefor to any personal representative of the decedent's estate or to any other successor having an equal or superior right.

1981, c. 281, § 64.1-132.4; 2010, c. 269;2012, c. 614.

§ 64.2-604. Payment or delivery of small asset; funeral expenses

Thirty days after the death of a decedent upon whose estate there shall have been no application for the appointment of a personal representative pending or granted in any jurisdiction, any person holding a small asset belonging to the decedent may, at the request of a successor, pay or deliver so much of the small asset as does not exceed the amount given priority by § 64.2-528 to the undertaker or mortuary handling the funeral of the decedent, and a receipt of the payee shall be a full and final release of the payor as to such sum.

2010, c. 269, § 64.1-132.5; 2012, c. 614.

§ 64.2-620. Nonprobate transfers on death

A. A provision for a nonprobate transfer on death in an insurance policy, contract of employment, bond, mortgage, promissory note, certificated or uncertificated security, account agreement, custodial agreement, deposit agreement, compensation plan, pension plan, individual retirement plan, employee benefit plan, trust, conveyance, deed of gift, marital property agreement, or other written instrument of a similar nature is nontestamentary.

Nontestamentary transfers also include writings stating that (i) money or other benefits due to, controlled by, or owned by a decedent before death shall be paid after the decedent's death to a person whom the decedent designates either in the instrument or in a separate writing, including a will, executed either before or at the same time as the instrument, or later; (ii) money due or to become due under the instrument ceases to be payable in the event of death of the promisee or the promisor before payment or demand; or (iii) any property controlled by or owned by the decedent before death that is the subject of the instrument passes to a person the decedent designates either in the instrument or in a separate writing, including a will, executed either before or at the same time as the instrument, or later.

B. This section does not limit rights of creditors under other laws of the Commonwealth.

2001, c. 583, § 64.1-45.3; 2012, c. 614.

§ 64.2-634. Liability for creditor claims and statutory allowances

A. After the death of the transferor, and subject to the transferor's right to direct the source from which liabilities will be paid, property transferred at the transferor's death by a transfer on death deed is subject to claims of the transferor's creditors, costs of administration of the transferor's estate, the expenses of the transferor's funeral and disposal of remains, and statutory allowances to a surviving spouse and children of the transferor including the family allowance, the right to exempt property, and the homestead allowance to the extent the transferor's probate estate is inadequate to satisfy those claims, costs, expenses, and allowances.

B. If more than one property is transferred by one or more transfer on death deeds, the liability under subsection A is apportioned among the properties in proportion to their net values at the transferor's death.

C. A proceeding to enforce the liability under this section shall be commenced not later than one year after the transferor's death.

2013, c. 390.

Code of Virginia
Title 64.2. Wills, Trusts, and Fiduciaries
Chapter 7. Uniform Trust Code

§ 64.2-747. Creditor's claim against settlor

A. Whether or not the terms of a trust contain a spendthrift provision, the following rules apply:

1. During the lifetime of the settlor, the property of a revocable trust is subject to claims of the settlor's creditors.

2. With respect to an irrevocable trust, except to the extent otherwise provided in §§ 64.2-745.1 and 64.2-745.2, a creditor or assignee of the settlor may reach the maximum amount that can be distributed to or for the settlor's benefit. If a trust has more than one settlor, the amount the creditor or assignee of a particular settlor may reach may not exceed the settlor's interest in the portion of the trust attributable to that settlor's contribution. A trustee's discretionary authority to pay directly or to reimburse the settlor for any tax on trust income or principal that is payable by the settlor shall not be considered to be an amount that can be distributed to or for the settlor's benefit, and a creditor or assignee of the settlor shall not be entitled to reach any amount solely by reason of this discretionary authority.

3. After the death of a settlor, and subject to the settlor's right to direct the source from which liabilities will be paid, the property of a trust that was revocable at the settlor's death is subject to claims of the settlor's creditors, costs of administration of the settlor's estate, the expenses of the settlor's funeral and disposal of remains, and statutory allowances to a surviving spouse and children including the family allowance, the right to exempt property, and the homestead allowance to the extent the settlor's probate estate is inadequate to satisfy those claims, costs, expenses, and allowances. This section shall not apply to life insurance proceeds under § 38.2-3122. No proceeding to subject a trustee, trust assets, or distributees of such assets to such claims, costs, and expenses shall be commenced unless the personal representative of the settlor has received a written demand by a surviving spouse, a creditor, or one acting for a minor or dependent child of the settlor, and no proceeding shall be commenced later than two years following the death of the settlor. This section shall not affect the right of a trustee to make distributions required or permitted by the terms of the trust prior to being served with process in a proceeding brought by the personal representative.

B. For purposes of this section:

1. During the period the power may be exercised, the holder of a power of withdrawal is treated in the same manner as the settlor of a revocable trust to the extent of the property subject to the power; and

2. Upon the lapse, release, or waiver of the power, the holder is treated as the settlor of the trust only to the extent the value of the property affected by the lapse, release, or waiver exceeds the greatest of (i) the amount specified in § 2041(b)(2) or 2514(e) of the Internal Revenue Code of 1986, (ii) the amount specified in § 2503(b) of the Internal Revenue Code of 1986, or (iii) two times the amount specified in § 2503(b) of the Internal Revenue Code of 1986 if the donor was married at the time of the transfer to which the power of withdrawal applies.

3. The assets in a trust that are attributable to a contribution to an inter vivos marital deduction trust described in either § 2523(e) or (f) of the Internal Revenue Code of 1986, after the death of

the spouse of the settlor of the inter vivos marital deduction trust shall be deemed to have been contributed by the settlor's spouse and not by the settlor.

2005, c. 935, § 55-545.05; 2011, c. 354;2012, cc. 555, 614, 718;2013, c. 784.

§ 64.2-1302. Waiver of inventory and settlement for certain estates

When a decedent's personal estate passing by testate or intestate succession does not exceed $25,000 in value and an heir, beneficiary, or creditor whose claim exceeds the value of the estate seeks qualification, the clerk of the circuit court shall waive the inventory under § 64.2-1300 and the settlement under § 64.2-1206. This section shall not apply if the decedent died owning any real estate over which the person seeking qualification would have the power of sale.

1980, c. 563, § 26-12.3; 1987, c. 605; 1989, c. 387; 1998, c. 117;2001, c. 598;2002, cc. 220, 227; 2012, c. 614;2014, c. 532.

The chapters of the acts of assembly referenced in the historical citation at the end of this section may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

Deering & Co. v. Kerfoot's Ex'r

Supreme Court of Virginia

December 15, 1892

No Number in Original

Reporter
89 Va. 491 *; 16 S.E. 671 **; 1892 Va. LEXIS 124 ***

Deering & Co. v. Kerfoot's Ex'or et als.

Disposition: **[***1]** Decree reversed.

Core Terms

testator, decree, the will, storehouse, personalty, deceased

Case Summary

Procedural Posture
A master commissioner was directed to convene appellants, the creditors of a testator, to ascertain his debts and assets and to settle the accounts of appellee, the testator's executor. The Circuit Court of Clarke County (Virginia) ruled in favor of appellees, the executor and the testator's widow, holding that the testator could by his will dedicate his personal and real estate to the payment of certain of his debts to the exclusion of others.

Overview
In a prior proceeding brought by the executor to construe the will without notice to the creditors, the circuit court held that the testator had the right to prefer the order in which his debts should be paid. A master commissioner subsequently convened the creditors to ascertain the testator's debts and assets and to settle the executor's accounts. The widow was allowed dower in a storehouse and lot belonging to the testator's former partnership after satisfaction of the partnership debts. The court overturned the circuit court's decree. First, the court held that the storehouse and lot were part of the social assets of the firm. They were personalty, in which the widow could participate only as a distributee. Second, Va. Code § 2665 (1887) did not alter or enlarge the common law liability of the personalty of a decedent as the primary fund for the payment of his debts. It did not give to a testator the right to prefer his creditors out of his personal assets as it did in the case of realty. Wills had to conform to the law, which in Va. Code § 2660 (1887) expressly prescribed the order in which personalty had to be applied in the payment of a decedent's debts.

Outcome
The court reversed the circuit court's decree and remanded the case to the circuit court for further proceedings.

LexisNexis® Headnotes

Estate, Gift & Trust Law > Estate Administration > Claims Against Estates > General Overview

Real Property Law > Ownership & Transfer > Death & Incapacity > General Overview

HN1[] Va. Code § 2665 (1887) does not alter or enlarge the common law liability of the personalty of a decedent as the primary fund for the payment of his debts and does not give to a testator the right to prefer his creditors out of his personal assets, as it does in the case of realty. It is expressio unius as to the realty, but exclusio alterius as to the personalty.

Estate, Gift & Trust Law > Estate Administration > Claims Against Estates > General Overview

Estate, Gift & Trust Law > Wills > Interpretation > General Overview

HN2[] Wills must conform to the law, which, in Va. Code § 2660 (1887) expressly and imperatively prescribes the order in which personalty shall be applied in the payment of a decedent's debts.

Estate, Gift & Trust Law > Estate Administration > Claims Against Estates > General Overview

HN3[] It is beyond the power of a testator to affect the legal order of payment by a direction in his will.

Estate, Gift & Trust Law > Estate Administration > Claims Against Estates > General Overview

HN4[] A testator has no power to direct his executor to pay all his debts equally, and thus defeat legal preferences.

Headnotes/Syllabus

Headnotes

1. Wills -- *Creditors*. -- Code, § 2665, makes decedent's real property assets for payment of his debts in the order in which his personal estate is directed to be applied; but it recognizes his right to charge his land, but not his personalty, for such of his debts as he may prefer.

2. Dower -- *Partnership land*. -- Land bought with partnership funds for partnership purposes is so far considered as personalty that widow of deceased partner is not entitled to dower therein, but only to her distributive share thereof. *Parrish v. Parrish, 88 Va. 529*

Syllabus

Appeal from decree of circuit court of Clarke county, rendered February 14th, 1890, in a suit wherein W. S. Kerfoot's executor was complainant and Mamie A. Kerfoot and others were defendants. The decree being favorable to the complainant, the defendants appealed. Opinion states the case.

Counsel: *M. McCormick*, for appellants.

A. Moore and *J. J. Williams*, for appellees.

Judges: Fauntleroy, J., delivered the opinion of the court.

Opinion by: Fauntleroy

Opinion

[*491] **[**671]** This suit was instituted to the January rules, 1888, by Thomas D. Gold, executor of W. S. Kerfoot, deceased, against **[***2]** Mamie A. Kerfoot, widow of W. S. Kerfoot, deceased, and Joseph R. Hardesty, who had been a partner of W. S. Kerfoot in the agricultural machinery business; and its object was to obtain from the court a construction of the will of W. **[*492]** S. Kerfoot, deceased; and, with no one before the court except the testator's widow and his late partner, Joseph R. Hardesty, the court proceeded to construe the will, and to pass upon the rights of creditors who were not before it, by its decree of February 11th, 1888, as follows: "And the court being of the opinion that the said testator, W. S. Kerfoot, had the right to prefer the order in which his debts should be paid out of the assets of his estate, doth adjudge, order, and decree that Thomas D. Gold, the executor and complainant, out of the assets now in his hands, and to come in his hands, do pay the said debts in the order in which the same are mentioned in the said will -- that is, he shall pay, first, the individual debts of the said testator, and then any notes upon which the said testator may be bound, as security for his brother, Wm. F. Kerfoot."

Acting under this order, the said executor, Thomas D. Gold, proceeded to distribute **[***3]** the estate in hand -- nearly five thousand dollars -- among the creditors named and preferred by the will, to the exclusion of the unpreferred creditors, and in the absence of both the preferred and the unpreferred creditors, none of whom were parties to the suit.

At the May term, 1888, an order, for the first time, was made, directing a master commissioner to convene the creditors of W. S. Kerfoot, deceased, to ascertain his debts and assets, and to settle the accounts of the executor. The master returned his report, in execution of this order, October 6th, 1888, in which is contained a settlement of the accounts of the executor, and which shows that, acting under the decree of February 11th, 1888, he had paid **[**672]** out to debts preferred by the will a sum in excess of forty-five hundred dollars, and also ascertaining and reporting a large number of debts still outstanding and unpaid. The commissioner also reported, as a matter of opinion, that the widow of W. S. Kerfoot was entitled to dower in an undivided half interest in a storehouse **[*493]** and lot in Berryville, which was the partnership property of Hardesty & Kerfoot, of which firm W. S. Kerfoot had been a member. To this report **[***4]** the creditors, who for the

first time were before the court in the cause, filed sundry exceptions. They denied that the widow was dowable in the partnership property, consisting of the storehouse and lot; and they excepted because the executor had paid large debts in full, and was allowed credit in his settlement therefor, while upon other debts of equal dignity he had made no payment at all. This raised the question whether a testator, *as to his personalty*, could, by his will, make any preference among his creditors. To this position the court was committed by its decree of February 11th, 1888; and the exceptions were overruled; the widow was allowed dower in the partnership property of the storehouse and lot, after the satisfaction of the partnership debts; and the principle, that a testator may, by his will, dedicate his personal estate, as well as his real estate, to the payment of certain of his debts, to the exclusion of others, was established by the decree of February 14th, 1890, which is the decree appealed from.

The court decreed that "W. S. Kerfoot's interest in the storehouse and lot, owned jointly by Joseph R. Hardesty and W. S. Kerfoot, is subject to the dower of **[***5]** said Kerfoot's widow, after the social debts of Hardesty & Kerfoot are provided for."

In this the court erred. The record establishes, beyond a doubt, that the storehouse and lot in Berryville was a part of the social assets of the firm of Hardesty & Kerfoot; and, being such, it is, in the eye of the law, *personalty*, in which the widow could participate only as a distributee. *Parrish v. Parrish, 88 Va. 529, 14 S.E. 325*.

The testator, Kerfoot, directed, by his will, his executor to collect his policies of insurance and his other personal assets, and, "having ascertained the amount of my indebtedness, which, having been legally proven, he will proceed to pay off -- and, *especially and first*, the following," &c., &c.

[*494] And the court, in its decree of the 14th of February, 1890, decreed that "the court, being further of the opinion that W. S. Kerfoot [the testator] had the right to charge his estate, both personal and real, with the payment of certain of his debts, in preference to others, and that by his will he did create such a charge therein," &c., &c., "it is further adjudged, ordered, and decreed that Thomas D. Gold, executor of W. S. Kerfoot, do, **[***6]** upon the rising of this court, expose to sale to the highest bidder, at public outcry, in front of the court-house in Berryville, the half interest in the storehouse and lot of which his testator died seized, owned jointly by him and Joseph R. Hardesty. Out of the proceeds of the one-half interest in the storehouse and lot, after deducting the personal assets of the said firm applicable thereto, and realized at the date of distribution," &c., &c., pay the widow's dower in the one-half interest of the deceased partner in the storehouse and lot, and then the debts as preferred in the will of the testator, and stated in the master commissioner's report.

We are of opinion that the circuit court erred in holding that, as to the personalty, the testator had the right to prefer his creditors. Section 2665, Code of 1887, makes real property assets for payment of debts of a decedent in the order in which the personal estate is directed to be applied; but it recognizes the common law right of the ancestor to indicate the charges he wishes to make upon the *land* for such of his debts as he may prefer. But the statute *HN1*[] does not alter or enlarge the common law liability of the personalty of **[***7]** a decedent as the primary fund for the payment of his debts, and does not give to a testator the right to prefer his creditors out of his *personal* assets, as it does in the case of *realty*. It is *expressio unius* as to the *realty*, but *exclusio alterius* as to the *personalty*. *HN2*[] Wills must conform to the law, which, in section 2660, Code of 1887, expressly and imperatively prescribes the **[*495]** order in which personalty shall be applied in the payment of a decedent's debts.

HN3[] "It is beyond the power of a testator to affect the legal order of payment by a direction in his will." 7 English and American Ency. (Thompson's), page 308, note and cases cited.

HN4[] "A testator has no power to direct his executor to pay all his debts equally, and thus defeat legal preferences." Redfield on Wills, 234 (edition of 1866). See Leading Cases in Equity, Vol. II., Part I., page 383; 1 Lomax on Executors, 559, 637; 2 Lomax on Executors, 401, 403.

We are of opinion that the decree appealed from is wholly erroneous; and, for the foregoing reasons, our judgment is to reverse the decree complained of, and to remand the case to the circuit court of Clarke county for such proceedings as **[***8]** shall conform to this opinion.

Decree reversed.

End of Document

Dolby v. Dolby

Supreme Court of Virginia

June 10, 2010, Decided

Record No. 091023

Reporter
280 Va. 132 *; 694 S.E.2d 635 **; 2010 Va. LEXIS 69 ***

CHRISTINE DOLBY v. CATHERINE DOLBY, ET AL.

Prior History: **[***1]** FROM THE CIRCUIT COURT OF FAIRFAX COUNTY. Robert J. Smith, Judge.

In re Estate of Dolby, 2008 Va. Cir. LEXIS 181, 78 Va. Cir. 59 (2008)

Disposition: Reversed and final judgment.

Core Terms

mortgage debt, circuit court, testator's, trust deed, decedent's, mortgage, right of survivorship, the will, entirety, spouse

Case Summary

Procedural Posture
A decedent's widow appealed from the Circuit Court of Fairfax County, Virginia, which ruled that a mortgage debt on property held by the decedent and his widow as tenants by the entirety with the right of survivorship was not an obligation of the decedent's estate and was not required to be paid from the estate, and that the property should pass to the widow subject to the debt.

Overview
On appeal, the widow argued that the circuit court erred in ruling that the mortgage debt was not an obligation of the decedent's estate. The court determined that the issue whether the estate was liable to pay the mortgage debt was resolved by answering two questions: (1) whether the decedent had a personal obligation to pay the debt, and (2) whether the mortgage debt was secured by real property owned by the decedent upon his death. The answer to the first question was that the decedent was personally and solely liable for the note that he signed. Therefore, the mortgage debt was a debt of his estate. In answer to the second question, the court ruled that the mortgage debt was not secured by real property owned by the decedent upon his death. The decedent's ownership interest did not survive his death. The spouses owned the property as tenants by the entirety with the right of survivorship. Therefore, the property passed to the surviving spouse by operation of law and was not part of the estate. According to the will, the estate was required to pay the mortgage debt.

Outcome
The court reversed the judgment.

LexisNexis® Headnotes

Estate, Gift & Trust Law > Wills > Interpretation > General Overview

Estate, Gift & Trust Law > ... > Interpretation > Intent of Testator > General Overview

HN1[] Virginia law has long held that the testator's intent is the "guiding star" in interpreting wills. When such intent is ascertained, effect will be given to it unless it violates some rule of law, or is contrary to public policy. Clearly, a testator cannot lawfully direct the executor of his or her estate not to pay lawfully enforceable debts based upon the testator's sole and personal obligation, or to charge such debts against property that passes outside of the testator's estate.

Counsel: John F. Boland (Robert J. Cunningham, Jr.; Stephen D. Charnoff; Rees Broome, on briefs), for appellant.

Ulka Patel Shriver; Kimberley Ann Murphy (Nealon & Associates; Hale Carlson Baumgartner, on briefs), for appellees Catherine Dolby, Kimberly Lauth, Heather Dolby Kho, Kirkmon Dolby, Christine Dolby, and Kent

Dolby.

Judges: PRESENT: Koontz, Kinser, Lemons, Goodwyn, Millette, and Mims, JJ., and Russell, S.J. OPINION BY JUSTICE LEROY F. MILLETTE, JR.

Opinion by: LEROY F. MILLETTE, JR.

Opinion

[*134] **[**635]** OPINION BY JUSTICE LEROY F. MILLETTE, JR.

In this appeal of a suit to seek aid and direction regarding the administration of a decedent's estate and trust, we address whether the circuit court erred in ruling that the decedent's estate was not liable for a debt evidenced by a promissory note, that was executed solely by the decedent, and **[**636]** secured by a deed of trust on real property held by the decedent and the decedent's surviving spouse as tenants by the entirety with the right of survivorship.

BACKGROUND

In 2002, Cornelius A. Dolby (Dolby) acquired title, in his name alone, to a house in McLean (the Property). In connection with the acquisition of the Property, Dolby executed a promissory note, also in his name alone, secured by a deed of trust with the Property as security. In 2005, Dolby refinanced and satisfied the original note and executed a new promissory note secured by a new deed of trust with the Property as security. Dolby was the sole obligor **[***2]** on the new 2005 note.

In early 2006, Dolby married Christine G. Dolby (Mrs. Dolby). On August 28, 2006, Dolby executed a deed transferring the Property to himself and Mrs. Dolby as tenants by the entirety with the right of survivorship. Dolby remained the sole obligor on the note after this transfer of ownership. Mrs. Dolby was not added as a joint obligor on the note, nor did she assume the obligation.

On September 19, 2006, Dolby executed a will and an amended trust. Article 1.3 of the will provides for the payment of "all legally enforceable debts." Article 1.3 stated in part:

> I hereby expressly empower my executor to pay such debts and expenses . . . . My Executor shall not be required to pay prior to maturity any debt secured by mortgage, lien or pledge of real or personal property owned by me at my death, and such property shall pass subject to such mortgage, lien or pledge.

Dolby died on December 25, 2006, and Mrs. Dolby, as the surviving spouse and tenant by the entirety, received title to the Property in fee simple absolute by operation of law. Mrs. Dolby, Kent Dolby, and Kirkmon Dolby (collectively, the Executors) were appointed as co-executors of the estate pursuant to Dolby's **[***3]** will. The **[*135]** Executors filed a complaint for aid and direction regarding the estate, asking the circuit court to determine whether Dolby's estate or Mrs. Dolby was liable for payment of the indebtedness on the note secured by the deed of trust (the mortgage debt). Mrs. Dolby filed an answer asking that the estate be responsible for the mortgage debt. Catherine J. Dolby, Kimberly Dolby Lauth, and Heather Dolby Kho (collectively, the Dolby children), as beneficiaries under the trust, filed an answer requesting that the mortgage debt not be paid from the estate, but instead pass with the Property as a lien on the Property.

At the conclusion of the bench trial, the circuit court issued a letter opinion and an order ruling that the mortgage debt was not an obligation of Dolby's estate and shall not be paid from the estate, and that the Property should pass to Mrs. Dolby subject to the debt. The circuit court held that Article 1.3 of Dolby's will evinced his intent that the Property pass to Mrs. Dolby subject to the mortgage debt.

Mrs. Dolby appeals. The Executors and the Dolby children participated in the appeal as appellees.

DISCUSSION

Mrs. Dolby argues that the circuit court erred in ruling **[***4]** that the mortgage debt is not an obligation of Dolby's estate because Virginia law requires that an estate pay its just debts. Mrs. Dolby contends that the mortgage debt is a debt of the Dolby estate because Dolby executed the note in his name alone, and thus was personally and solely liable for the mortgage debt, even though it was secured by the mortgage on the Property. Mrs. Dolby asserts that a testator does not have the authority to direct his or her estate not to pay a just debt or to shift the obligation of the debt to property that is outside of the testator's estate.

In response, the Dolby children argue that a testator may assign his or her debts to property that secures that debt. The Dolby children concede that the Property is not part of Dolby's estate and that the pertinent language in the will refers only to transfers under the

will. The Dolby children argue, however, that the circuit court's ruling was correct because it gave effect to Dolby's intent that the mortgage debt pass with the Property.

[637]** The issue whether Dolby's estate is liable to pay the mortgage debt is resolved by answering two questions: (1) whether Dolby had a personal obligation to pay the debt, and (2) **[***5]** whether the mortgage **[*136]** debt is secured by real property owned by Dolby upon his death. The answer to the first question is that Dolby was personally and solely liable for the note that he signed. *Brown v. Hargraves, 198 Va. 748, 751, 96 S.E.2d 788, 791 (1957)*. In *Brown*, we addressed whether a deceased joint tenant's estate was liable for payment of a debt evinced by two notes, jointly executed by both joint tenants, which were secured by deeds of trust on land held as joint tenants with the right of survivorship. *Id. at 749, 96 S.E.2d at 789*. In holding that the deceased joint tenant's estate was liable for one-half of the joint debt, we stated:

> The answer to the question presented us depends upon whether or not the obligation was one for which each of the makers thereof was personally liable. That question must be answered in the affirmative.
>
> In this case, whether the debt was for a loan for money advanced, for purchase-money, or was secured or unsecured, is not material in fixing liability. Where the obligation to pay the debt is personal, joint and several, as here, **it is the nature of the obligation which controls**. *Cf*. Annotation, 5 A.L.R. page 503. The debt evidenced by the notes **[***6]** was created when the notes were executed. The makers thereof became primarily liable, jointly and severally. The deeds of trust merely created liens on the realty, a collateral security for the payment of the notes.

Id. at 751-52, 96 S.E.2d at 791 (emphasis added).

In this case, unlike in *Brown* which involved a joint obligation of the two owners of the secured property, the mortgage debt arises from a note upon which Dolby was solely liable. Mrs. Dolby was not added as a joint obligor on the note, nor did she assume the obligation. Although Dolby and Mrs. Dolby owned the Property as tenants by the entirety with the right of survivorship upon Dolby's death, the mortgage debt on the Property remained a personal obligation of Dolby at the time of his death. Therefore, the mortgage debt is a debt of Dolby's estate. *Id. at 752, 96 S.E.2d at 791-92*. *See also Caine v. Freier, 264 Va. 251, 259, 564 S.E.2d 122, 127 (2002)* (holding that a deceased spouse's estate is liable for contribution to the surviving spouse on a mortgage debt upon which both spouses were personally **[*137]** liable). Additionally, Article 1.3 of Dolby's will directs the Executors to pay all of the estate's "legally enforceable debts."

The **[***7]** second question we must answer to determine if Dolby's estate is liable for the mortgage debt is whether the mortgage debt is secured by real property owned by Dolby upon his death. The answer to that question is no. Article 1.3 provides that the Executors are not required to pay prior to maturity any debt secured by mortgage on real property that is owned by Dolby upon his death. This exception does not apply to the Property because Dolby's ownership interest did not survive his death. *Id. at 259, 564 S.E.2d at 126*. Rather, Dolby and Mrs. Dolby owned the Property as tenants by the entirety with the right of survivorship. Therefore, the Property passed to Mrs. Dolby by operation of law and is not part of the Dolby estate. The exception exempting the Executors from paying a debt prior to its maturity does not apply, and the Dolby estate must, according to the will, pay the mortgage debt. The circuit court erred in concluding that the exception in Article 1.3 for mortgages on real property applied.

The Dolby children's argument that the estate is not liable to pay the mortgage debt because Dolby did not intend for his estate to pay the mortgage debt is without merit. ***HN1***[] Virginia law has **[***8]** long held that the testator's intent is the "guiding star" in interpreting wills. *Smith v. Trustees of Baptist Orphanage, 194 Va. 901, 903, 75 S.E.2d 491, 493 (1953)*. When such intent is ascertained, "effect will be given to it unless it violates some rule of law, or is contrary to public policy." *Conrad v. Conrad, 123 Va. 711, 716, 97 S.E. 336, 338 (1918)*. Clearly, a testator cannot lawfully direct the executor of his or her estate not to pay lawfully enforceable debts based upon the testator's sole and personal **[**638]** obligation, or to charge such debts against property that passes outside of the testator's estate. *Edmunds v. Scott, 78 Va. 720, 726 (1884)* (holding that the duty of an executor of an estate is to first pay the decedent's debts).

CONCLUSION

For the reasons stated, we will reverse the judgment of the circuit court and enter final judgment in favor of Christine Dolby that the mortgage debt is an obligation

of and shall be paid from the estate of Cornelius A. Dolby.

Reversed and final judgment.

End of Document

Lindsay v. Howerton

Supreme Court of Virginia

September 9, 1807

No Number in Original

Reporter
12 Va. 9 *; 1807 Va. LEXIS 57 **; 2 Hen. 9; M. 9

Lindsay v. Howerton.

Headnotes/Syllabus

Headnotes

[1] Executors and Administrators -- Right to Counsel Fees.** * -- An executor or administrator ought to be credited in his administration account for fees paid to counsel, notwithstanding those fees were more than the law allowed.

Syllabus

The commissioners, in this case, appointed to settle the defendant's administration account, refused to allow some charges made for fees paid to counsel, because they were for more than the law allowed.

Opinion

[*10] PER CURIAM. There can be no doubt but that the defendant has paid those fees on account of his intestate's estate; and, as he could not do without the aid of counsel, whose conduct he could not regulate, he should be allowed the sums he has paid. The Court, in giving this opinion, is supported by the opinion of the former Chancellor, as appears by **[**2]** his notes in this very case.

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* **Executors and Administrators -- Counsel Fees.** -- Reasonable fees paid counsel are always allowed as credits to the administrator. *Crim v. England, 46 W. Va. 480, 33 S.E. 311*, citing *Lindsay v. Howerton*, 2 *Hen. & M.* 9; *Nimmo v. Com., 4 Hen. & M. 57*.

See monographic *note* on "Executors and Administrators" appended to *Rosser v. Depriest, 5 Gratt. 6*.

McCormick's Ex'rs v. Wright's Ex'rs

Supreme Court of Virginia

October 7, 1884

No Number in Original

Reporter
79 Va. 524 *; 1884 Va. LEXIS 108 **

McCormick's Ex'ors & Als. v. Wright's Ex'ors & Als.

Disposition: **[**1]** Decree affirmed.

Core Terms

decree, surety, parties, settlements

Case Summary

Procedural Posture
Appellants, executors of a decedent's estate, challenged a decree of the Circuit Court (Virginia), which found them liable to appellees, creditors of another estate, for losses that resulted when a co-executor of the other estate reimbursed himself from the estate's assets.

Overview
The executors of two estates united in making sales of real and personal property belonging to the estates and made joint settlements on the accounts of the estates. One co-executor also paid with his own funds some of the decedent's debts upon which the co-executor was also bound as surety. The co-executor then reimbursed himself from the assets of the estate. The other creditors of that estate brought an action to recover for misapplication of estate assets. The trial court ruled in favor of the creditors. The court affirmed the trial court's decree, finding that the executors of the other estate were jointly liable for the loss resulting from the co-executor's reimbursement of himself. However, they were liable not as surety but as joint principal debtor because they had notice of the co-executor's claim for reimbursement, allowed the co-executor to collect the assets, and permitted the misapplication of the assets.

Outcome
The court affirmed trial court's decree, which found the executors to be liable for the co-executor's misapplication of estate assets. The court modified the decree to hold the executors liable as joint principal debtor instead of as surety.

LexisNexis® Headnotes

Contracts Law > Third Parties > Joint & Several Contracts

Estate, Gift & Trust Law > ... > Probate > Personal Representatives > General Overview

HN1[] Each joint executor is liable as principal for his own acts, and as surety for the acts of his companion when they execute a joint official bond. But when one of the executors actually or tacitly assents to a misapplication of the assets by the other, or knowing of an intended misapplication of the assets, he fails to interfere, and loss occurs, when by the exercise of reasonable diligence he might have prevented it, he thereby renders himself responsible as a principal debtor for such default. There can be no doubt that if an executor knows that the moneys received by his co-executor are not applied according to the trusts of the will, and stands by and acquiesces in it without doing anything on his part to procure the due execution of the trusts of the will, in respect of the negligence, he himself will be charged with the loss.

Estate, Gift & Trust Law > ... > Probate > Personal Representatives > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

HN2[] Ex parte settlements have no sort of analogy to stated accounts between individuals. Their efficacy as evidence rests upon the long established practice and usage of the country, and upon the supposed integrity of

the tribunal appointed by law for the adjustment of such matters; whereas a stated account is founded upon a supposed adjustment between the parties themselves. But the statute itself prescribes the time within which an action may be brought against the sureties on an executor's bond, which is 10 years after the right to bring the same shall have first accrued. And it further provides, that the right of a person obtaining execution against the executor, or to whom payment or delivery of estate in the hands of the executor shall be ordered by a court acting upon his account, shall be deemed to have first accrued from the return day of such execution, or from the time of the right to require payment or delivery upon such order, whichever shall happen first. Va. Code Ann. ch. 146, §§ 8 and 9 (1873).

Headnotes/Syllabus

Headnotes

1. Personal Representatives -- *Devastavit*. -- Where executor *as surety* for testator pays debts out of his own funds, he is entitled only to his ratable share of the assets to repay his advances; and by crediting himself with the full amount of those debts, he commits an error to the prejudice of the other creditors having unpaid debts of equal dignity.

2. Idem -- *Ex Parte Settlements* -- *Impeachment*. -- Where from face of settlement, it appears that executor has paid in full some debts and left unpaid, in part or wholly, other debts of equal dignity, such settlement stands impeached *per se*.

3. Idem -- *Statute of Limitations*. -- As to fiduciaries themselves, there is no limitation except what results from staleness of demand or presumption of payment. Otherwise as to their sureties, Code 1873, ch. 146, § 9.

4. Appellate Court -- *First Appeal* -- *Second Appeal*. -- It is a settled rule that decrees of the court of appeals on questions decided by the court below, are conclusive, and on second appeal those questions cannot be again raised. *N.Y.F. Ins. Co. v. Clemmitt, 77 Va. 366*.

5. Co-Executors -- *Liability* -- *Rule* **[**2]** . -- General rule as to joint executors, is that each is liable as principal for his own acts, and as surety for the acts of his companion. *Morrow* v. *Peyton*, 8 Leigh, 54. But where one assents to misapplication of assets by the other, or knowing his intent to misapply, he fails to interfere, and loss occurs, which by reasonable diligence he might have prevented, he thereby renders himself liable as principal for such default. *Caskie v. Harrison, 76 Va. 85*.

6. Ex Parte Settlements -- *Stated Accounts*. -- The first have no analogy to the latter. The efficacy of the former, as evidence, rests upon long established usage and the supposed integrity of the tribunal appointed by law for the adjustment of such matters; whereas a stated account is founded upon a supposed adjustment between the parties themselves. *Leake v. Leake, 75 Va. 792*.

7. Fiduciaries -- *Sureties* -- *Statute of Limitations*. -- Action against sureties on fiduciary's bond, may be brought within ten years after accrual of right of action; that is, from return day of execution against fiduciary, or from time of right to require payment or delivery from fiduciary. *Sharpe's Ex'r v. Rockwood **[**3]** , 78 Va. 24*.

Syllabus

Appeal from two decrees of circuit court of Frederick county, rendered 24th November, 1882, and 3d December, 1883, respectively, in the cause of Daniel Wright's executors and others against Thomas Allen Tidball's executors and others.

Mr. Tidball died in 1856, and his will was probated 6th May of that year, and James Marshall and Province McCormick named therein as executors, duly qualified as such, giving bond in penalty of $ 70,000, with Henry M. Marshall, Francis McCormick, William Taylor, and Hugh H. McGuire, as sureties. They proceeded to administer the estate, and in September, 1857, for the first year, and in May, 1859, for the two succeeding years, their accounts were settled *ex parte*, and at last date, under the statute and at their requests, the debts of the estate were also audited by the same commissioner, and both being reported to the county court of said county, were, at its July term, 1859, approved and ordered to be recorded. The accounts were stated jointly, and also, at the request of the executors, separately, and resulted as follows: Due the executors, $ 4,058.20, with interest thereon from May 16th, 1859; due to James Marshall $ **[**4]** 4,277.58, and from Province McCormick, $ 228.04. There was another settlement confirmed August 6th, 1860, showing balance due James Marshall of $ 4,918.13, as of May 1st, 1860. And another confirmed March 16th, 1868, showing balance due James Marshall of $ 6,578.84, with interest on $ 4,937.17 from May 1st, 1868, and due by Province McCormick $ 305.82, with interest from that day on $ 199.45. These settlements

were approved in September, 1868.

In October, 1878, the personal representatives of Daniel Wright and H. M. Brent filed their bill on behalf of themselves and all other creditors of Tidball's estate, for settlement of executorial accounts and payment of debts. Province McCormick had died July 1st, 1873; Francis McCormick, April 16th, 1872, and Hugh H. McGuire in 1875.

In November, 1878, the cause was referred, *inter alia*, to settle executorial accounts. It was reported May 21, 1880, that Province McCormick was still chargeable with the balance of $ 305.82 and no more, and that James Marshall was indebted to the estate, $ 15,057.67, with interest on $ 9,927.52, from May 1, 1880; or $ 24,731.48, if he were charged with the Angus McDonald debt as lost by his negligence. **[**5]** The counsel for creditors excepted to this report, because it gave Mr. Marshall credit for payment in full of sundry debts for which he was surety for Mr. Tidball, whilst other debts of equal dignity remained unpaid in whole or in part, the assets being insufficient to pay all of the debts; such course being prejudicial to the unpaid creditors and a *devastavit*, and also because the report treated sundry loans as investments and allowed commissions. In conformity with the will, the executors had sold, in 1856, part of the real estate to Angus McDonald, for $ 10,000, whereof one-third had been collected; also down to the close of the war, the interest on the residue secured on the property, the valuable buildings on which having been destroyed during the war by the Federal forces, said residue was lost. Upon this report and the exceptions, in November, 1880, the court below decided that the executors should not be credited with any debt of the estate paid by them beyond the ratable share of such debt in the assets; that in the loans they were guilty of no then perceivable error; that they were not liable for the loss of the McDonald debt, and recommitted the cause to ascertain and **[**6]** distribute the funds.

From this decree an appeal was taken to this court. The error complained of was the exoneration of the executors from liability for the loss resulting from their alleged *laches* in failing to collect the McDonald debt, but the decree was affirmed and the cause remanded for further proceedings. Under the decree a report was filed November 14th, 1882, and ten days later a decree entered confirming the report, which showed that James Marshall, as executor, was indebted to the estate in $ 19,994.15, with interest, &c., and directed the payment thereof by all the the parties to the executorial bond. But on motion to review, the decree was suspended and the cause recommitted on certain exceptions. A new report was filed June 3d, and on December 3d, 1883, a decree was entered amending the decree of November 24th, 1882, by reducing the amount from $ 19,994.15 to $ 19,225.99, with interest from November 20th, 1882, subject to credit for $ 722.07, with interest from June 1st, 1883, and ordering Holmes Conrad, executor of James Marshall, deceased' *de bonis testatoris*, the said personal representatives of Province McCormick, deceased, *de bonis testatoris*, **[**7]** the said personal representatives of Francis McCormick, deceased, *de bonis testatoris*, the said personal representative of Hugh H. McGuire, deceased, also *de bonis testatoris*, William Taylor and Henry M. Marshall, to pay to William L. Clark, general receiver of the court, the said amount, and decreeing that the relation of the estate of Province McCormick to that of James Marshall is that of surety, and of co-surety with the other obligors on the executorial bond, and that the statute of limitations is no bar to the relief asked for against said sureties, because the cause of action accrued within ten years before suit brought. From these decrees the said personal representatives of Province McCormick, deceased, and of Francis McCormick, deceased, obtained an appeal and *supersedeas*.

Counsel: *John J. Williams*, for the appellants.

I. It will be seen then that to sustain the decree complained of it is necessary to hold:

1. That it was a *devastavit* to make these payments.

2. That it was error in the *ex parte* settlements to give credit for such payments because a *devastavit* to make them.

3. That *therefore* the *ex parte* settlements **[**8]** should be surcharged and falsified in the matter of these erroneous credits.

It is submitted that *there was no devastavit*, although the executor paid some debts in full, some in part, and some not at all, because he had a right to do so unless the assets of the estate *were insufficient* to pay all its debts. A *devastavit* is "a breach of official duty;" the statute lays down as the rule of duty, in the matter of the "order in which debts shall be paid;" *not* that in *all* cases and in *any* event shall the order there prescribed be followed, viz: "All other demands ratably," but only "when the assets of the decedent are not sufficient for the satisfaction of all demands against him." Code 1873,

ch. 126, § 25.

For both what is said and left unsaid in this statute are alike significant of the meaning we claim for it. It lays down *no* fixed rule, to be followed without discretion and in all cases, for to do this was merely to omit the words "when the assets are not sufficient," &c. Nor does it prescribe *pro rata* payments unless the assets are sufficient, for it does not say so, but on the contrary, it does *not* prescribe *pro rata* payments except **[**9]** "where the assets are *not* sufficient."

And the reason for this was doubtless the recognition of the fact that it was often to the interest of an estate to pay debts otherwise than in the order prescribed; so as to pay off those pressing, bearing large interest, tying up property, &c.; or such a case as that of the testator here, who by his will empowered and desired his executors to dispose of his estate so as to save "from loss or inconvenience" any person "in any way responsible for him as security."

This view is indicated by our courts when it is said, "For surely, if there be a sufficiency of assets, it is of no consequence in what order they are paid."

Braxton, Executor of Claiborne, v. Winslow, 1 Wash. 31, or as is said in the report of same case in *4 Call. 33*:

"It is not a *devastavit* in the executor to pay debts of inferior dignity, if he shall retain assets enough to discharge those of higher degree."

This was just what was done here. The will made *all* the estate, real and personal, assets in the hands of the executors for the payment of the debts. They had thus enough to pay all in full at the time the disputed payments were made.

The **[**10]** bill says so, and the accounts in the record show a surplus of assets over the debts of $ 9,131.74, if you include the *McDonald* debt. It is the loss on this debt that has made the deficiency, and for this loss the court of appeals held the executors were not responsible, because owing to the unforeseen circumstances and not to their default in duty.

II. The liability here imposed was *barred by the statute of limitations*.

As already shown, it is based upon an alleged *devastavit*, which it has been submitted was no *devastavit*. But if it was, what and when was it? To pay to one creditor more than his *pro rata* share and to others less or none. And the time of this *devastavit* was at the time of such payments, or of the yearly balances, or of the settlements in which they were charged up against, and thus appropriated the assets of the estate. Taking either as the time, and the date of the *devastavit* was prior to July, 1860 (the date of the last of the settlements in which the disputed payments were credited), and thus more than ten years prior to the institution of this suit -- October rules, 1878, for excluding the duration of the stay law, that is **[**11]** more than ten years.

The exception sustained by the decree of November, 1880, excepted to these payments because "*devastavits* as to the other creditors." "The action of these creditors is not upon the accounts settled, but for the *devastavit*, and the right accrues ordinarily and the statute begins to run when the wrongful act is committed." *Leake's Executor & al.* v. *Leake & als*, *75 Va. 792*.

The appellees claim it was too late to plead the statute of limitations.

In reply, we submit "the only reason for requiring the defense to be made by plea or answer is, *that the plaintiff may* have an opportunity, if he can, to take the case out of the operation of the statute." *Tazewell's Ex'r* v. *Whittle's Adm'r & als.*, *13 Gratt. 329*.

Here the exceptions setting up the statute endorsed June 9th, 1883, were filed in open court June 20th, 1883, thus plaintiff was given an opportunity to take the case out of operation of the statute by having it sent back to the commissioner or otherwise.

But this he did not do, because, as is seen, the grounds he relied upon were already in the case.

In same case, page 345, the principle is recognized that **[**12]** it not appearing that the statute offered a bar to the claim until after the bill, "the proper mode of making the defence, therefore, was by *exception* to the commissioner's report of the claim."

The bill did not state the claim with sufficient distinctness to enable the defendant to see at what dates plaintiff claimed his alleged cause of action to have arisen. The accounts exhibited were only a part of those in the case. Nor did he, although his attention was called to this by defendant's exceptions filed January 16th, 1883, and report recommitted at March term, 1883, file any specifications before the commissioner.

And defendant was not bound to make this defence of limitations until plaintiff offered him this opportunity of doing so intelligently.

The fact that no exceptions setting up the statute of limitations was filed before the case went to the court of appeals does *not* preclude such exception now as too late by reason of this fact.

The decree of November 27th, 1880, affirmed by said decision, did not confirm the report settling the accounts -- had merely decided four questions arising upon the exceptions thereto, and recommitted the cause.

This **[**13]** point of statute of limitation as defence of *surety* is certainly open -- and so it was competent for defendants to raise the question as they did by exception to the commissioner's report at any time before final decree. *Miller's Adm'r v. Cook's Adm'rs, 77 Va. 806*.

The question of the statute of limitations was not settled by decree of November, 1880, and its affirmance by the court of appeals, as against the sureties.

The question of the statute had not been raised in the court below by any one, and hence was not decided by it until the decree now appealed from.

It was first raised in the court of appeals by James Marshall, and decided against *him*, because it had not been relied upon in the court below, and whilst the limitation of ten years applies to suits upon the executorial bond against the sureties, it was no sort of application to suits against the executor "himself." *Frazier* v. *Frazier and als*., *77 Va. 775, 783-784*.

Quoad this statute of limitation, then the sureties do not "stand upon the same ground" nor are "their rights involved in the same question" as the executor James Marshall, but on the contrary they "stand upon distinct **[**14]** and unconnected ground." "their rights are separate, &c., and not equally affected by the same decree or judgment." Hence, the cross appeal of James Marshall, *quoad* the statute of limitations did not bring up for adjudication the rights or claims of the sureties. *Walker v. Page, 21 Gratt. 636 at 652-653*.

The executors of Province McCormick had the right to plead the statute of limitations, though he was co-executor.

1. For reason stated in decree, p. 87.

2. *Even as against creditors or legatees*, when two executors execute a joint bond, they are liable as principals *only* for their *devastavits* committed by them jointly, or for moneys received by them jointly. For a *devastavit* committed, or money received by either *alone*, the other is liable only as his *surety. Caskie's Ex'or v. Harrison, 76 Va. 85, 97, 98*. *Morrow's Adm'r v. Peyton's Adm'r and als.*, 8 Leigh, 54, 63, 64, 65, 68, 69, 70, 75. *Cox and als.* v. *Thomas' Adm'rs, 9 Gratt. 312 at 317-319*. In which *Clark* v. *Slater* (cited by B. & B.'s note) is reviewed. *Peale* v. *Hickle and als*., *9 Gratt. 437*, 443-444. Code 1872, ch. 146, § 59, "which could have been **[**15]** maintained had he given no bond."

The joint accounts of the executors do not make them jointly liable, because qualified by subsequent or contemporaneous separate accounts. L. Cas. in Eq. vol. II, pt. 2, p. 1796 (ed. 1877).

The decree of November 27th, 1880, did *not* decree the joint liability of the two executors.

The questions involved in the present appeal are not precluded by the former decree of the court of appeals.

The suit is barred by *laches* of complainants in bringing their suit, the delay resulting in the death of all of the executors and their sureties, except James Marshall, before suit, and his death pending the settlements of the accounts. *Hatcher v. Hall, 77 Va. 573*.

III. The *ex parte* settlements have never been sufficiently surcharged or falsified; *i.e*.: with sufficient specifications -- not in the bill, nor by any specification filed before the commissioner so as to give an opportunity to file thereto the equivalent of an answer or plea. *Leake v. Leake's Ex'r, 75 Va. 792, 804*.

Dandridge & Pendleton, Barton & Boyd, for the appellees.

Judges: Lewis, P., delivered the opinion of the court. Absent, Hinton, J.

Opinion by: **[**16]** Lewis

Opinion

[*532] On the former appeal in this case it was held, affirming the decree of the circuit court: 1. That Mr. Marshall, one of the executors of Tidball, was entitled only to his *pro rata* share of the assets of the estate in payment of the advances made by him on account of

certain debts of the testator, upon which he was bound as surety, and that, therefore, "in crediting himself with the full amount of those debts, he committed an error to the prejudice of the other creditors." 2. That the *ex parte* settlements of the **[*533]** executors were sufficiently impeached by the allegations of the bill, the errors complained of being apparent on the face of the accounts; and 3. That the defence of the statute of limitations had not been interposed in the lower court, and could not have availed, if it had been, in favor of the executors themselves; that as to them, the responsibility is that of a fiduciary or trustee as to whom there is no limitation, except that which results from the staleness of the demand or the presumption of payment.

These questions must, therefore, be regarded as finally and conclusively settled as between the parties to that appeal. *Campbell* **[**17]** *v. Campbell, 22 Gratt. 649*; *Ins. Co. v. Clemmitt & Life, 77 Va. 366*; *Frazier v. Frazier, 77 Va. 775*; *Miller's Adm'r v. Cook's Adm'r, 77 Va. 806*.

The questions, then, to be considered on this appeal relate, first, to the nature of the liability of the estate of Province McCormick, who was a co-surety with Marshall; and, secondly, to the liability of the estate of Francis McCormick, who was a surety on the joint bond of the executors.

In respect to the liability of joint executors, the settled general rule is, that **HN1**[⬆] each is liable as principal for his own acts, and as surety for the acts of his companion when they execute a joint official bond. *Morrow v. Peyton, 8 Leigh 54*; 1 Lom. Ex'ors, 333. But when one of the executors actually or tacitly assents to a misapplication of the assets by the other, or knowing of an intended misapplication of the assets, he fails to interfere, and loss occurs, when by the exercise of reasonable diligence he might have prevented it, he thereby renders himself responsible as a principal debtor for such default. *Caskie's Ex'rs v. Harrison, 76 Va. 85*. In that case the ruling of Lord Langdale in *Williams* v. *Nixon*, **[**18]** 3 Beav. 472, was referred to, where he said: "There can be no doubt that if an executor knows that the moneys received by his co-executor are not applied according to the trusts of the will, and stands by and acquiesces in it without doing anything on his part to procure the due execution of the trusts of the will, in respect of the negligence, he himself **[*534]** will be charged with the loss." See the authorities collected in 2 Lead. Cases in Eq. (ed. 1877), part 1, 1794, *et seq*.

In the present case the executors united in making sales of the real and personal property, and made joint settlements of their accounts. They were both privy to the auditing of the debts of the estate, and thus McCormick had notice of the claim asserted by his co-executor to be reimbursed to the full amount of the debts which, as surety for the testator, he had discharged. Notwithstanding, he allowed his co-executor to collect the assets, and without interference or objection on his part to misapply them. He thereby became properly chargeable, at the suit of creditors, as a principal debtor for the loss that occurred, and not as surety, as was held by the circuit court. This, however, is a question **[**19]** of little practical importance in the present case, as the result to the appellees is substantially the same.

Most of the objections urged by the executors of the surety, Francis McCormick, are disposed of by the decree on the former appeal, to which they were parties. They rely on the statute of limitations and lapse of time, which defence, however, was not set up by plea or answer, but by exceptions to the master's report after the case went back to the circuit court. Without stopping to decide whether the defence was asserted in time, it is sufficient to say that it cannot avail under the circumstances of this case.

It appears that in the *ex parte* settlements of 1857 and 1859 the executors credited themselves with the debts in full, which Mr. Marshall, as surety, had paid out of his own means, thus showing a large balance due the executors on the face of the accounts; but, in point of fact, the greater portion of the money which was misapplied was afterwards collected, a part of it as late as the year 1870. The defence is founded upon a mistaken idea as to the effect of the *ex parte* settlements. As was said in *Leake's Ex'or* v. *Leake et als*., *75 Va. 792*, **HN2**[⬆] such settlements **[**20]** have no sort of analogy to stated accounts between individuals. Their efficacy as evidence rests upon the long established practice and **[*535]** usage of the country, and upon the supposed integrity of the tribunal appointed by law for the adjustment of such matters; whereas a stated account is founded upon a supposed adjustment between the parties themselves. But the statute itself prescribes the time within which an action may be brought against the sureties on an executor's bond, which is ten years after the right to bring the same shall have first accrued. And it further provides, that the right of a person obtaining execution against the executor, or to whom payment or delivery of estate in the hands of the executor shall be ordered by a court

acting upon his account, shall be deemed to have first accrued from the return day of such execution, or from the time of the right to require payment or delivery upon such order, whichever shall happen first. Code 1873, ch. 146, §§ 8 and 9; *Sharpe's Ex'or* v. *Rockwood et als*., [78 Va. 24]. Here no order for the payment of money or delivery of estate by the executors was made by any court until the entry of the decree now complained **[**21]** of. Moreover, it may be regarded as settled by the former decree of this court, that the executors were not in default as late as the year 1861. The running of the statute was suspended from the 17th day of April, 1861, to the 1st day of January, 1869, and the present suit, which was brought to October rules, 1878, was begun within ten years after the latter date.

Equally unavailing is the defence founded upon alleged *laches* and lapse of time. The suit was brought in the lifetime of the active executor, and it does not appear that by reason of the death of parties or the loss of evidence it has become impossible, or even difficult to do justice between the parties. The defence was, therefore, properly overruled by the circuit court, and the decree, subject to the qualification indicated, must be affirmed.

The decree was as follows:

This day came again the parties by their counsel, and the court, having maturely considered the transcript of the record of **[*536]** the decrees aforesaid and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the said decree of the 3d day of December, 1883, in so far as it holds that as co-executors **[**22]** there "is no joint liability, as executors, on the estates of James Marshall, deceased, and Province McCormick, deceased, and that the relation of the estate of the latter to that of the former, is that of surety" is erroneous. This court being of opinion, for reasons stated and filed as aforesaid, that the liability of the estate of the said Province McCormick, deceased, is that of a joint principal debtor with the estate of the said James Marshall, deceased. It is therefore considered and ordered, that in this particular the said decree be, and the same hereby is corrected, and as corrected, affirmed. And it is further considered and ordered that the appellees recover of the appellants their costs by them expended, &c., &c., &c. The costs and damages to be paid by the appellants out of the estates in their hands, respectively, to be administered, &c., &c. Which is ordered to be certified, &c., &c.

Decree affirmed.

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